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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAN SMARGON et al.,

Plaintiffs and Appellants,

v.

DAVID H. GLEESON et al.,

Defendants and Respondents.

D050980

(Super. Ct. No. GIC866310)

APPEAL from an order of the Superior Court of San Diego County, Linda B. Quinn,  
Judge. Affirmed.

Dan Smargon and Audrey Viterbi, husband and wife, (together Plaintiffs) appeal from an order granting the separate motions of David H. Gleeson and Steven M. H. Wallman (together Defendants) for an order quashing service of summons based upon the lack of personal jurisdiction. We conclude that the evidence before the trial court of Defendants' contacts with California was insufficient to establish personal jurisdiction; accordingly, we affirm the order.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Background

In 1998, codefendant Vergil L. Daugherty III contacted Wallman and asked him to review an idea he had regarding "expirationless options," or XPOs as an investment device. In January 1999, Daugherty founded Economic Inventions, LLC, a Georgia limited liability company, for the purpose of marketing XPOs. Wallman later became a board member for Economic Inventions and received a 15 percent interest in the company in exchange for providing advisory services and \$750 in cash. Wallman retained his board position until October 2003 when he no longer had the time to devote to those services. After that date, Wallman remained a shareholder and had a few conversations with Daugherty.

Gleeson learned of Daugherty through his sister and contacted him about the XPO invention. Gleeson later became the president of Economic Inventions, received a 29.75 percent interest in the company and initially focused his activities on patent filing. Ultimately, Economic Inventions obtained three patents concerning the trading of XPOs. Thereafter, Gleeson reached out to people in the industry, attempting to get stock exchanges interested in licensing the XPO product.

### B. The Complaint

In 2002, codefendant Geneva Wasserman contacted Plaintiffs to solicit their investment in Economic Inventions and sent them written information on the company that listed Wallman and Gleeson as "key personnel." In May 2003, Plaintiffs wrote to Wasserman and enclosed a note from a friend questioning the concept of XPOs. Wasserman obtained a response from Daugherty and forwarded it to Plaintiffs. Daugherty suggested that

Plaintiffs contact Wallman, a triple MIT graduate and former commissioner for the Securities and Exchange Commission, if they had any additional questions. In May 2003, Plaintiffs invested \$200,000 in the company, but they never spoke to Wallman.

In November 2002, Economic Inventions entered into a written agreement with third party NexTrade, pursuant to which NexTrade received an exclusive license to Economic Inventions's patents for the lifetime of the patents. In June 2005, Plaintiffs learned about the NexTrade agreement and ultimately obtained a copy of the agreement. Plaintiffs retained counsel after they unsuccessfully attempted to obtain additional information about the management and finances of Economic Inventions.

Plaintiffs and Kobe Holdings, LLC (Kobe), another investor, filed this action against Defendants, Economic Inventions, Daugherty and Wasserman alleging causes of action for intentional and negligent misrepresentation and securities fraud and seeking an accounting and the imposition of a constructive trust. They claimed that before they invested, Defendants failed to disclose that they had already sold the patent licensing rights to NexTrade. They also alleged that Defendants and Daugherty breached fiduciary duties to properly capitalize the company, comply with corporate formalities, account for expenditures and provide information and that they engaged in a scheme to dilute Plaintiffs' interest in the company.

### C. Motions to Quash

Defendants moved to quash service of summons based upon lack of personal jurisdiction. In support of their motions, they presented evidence showing that other than occasional recreational travel to California, they had no contact with California and that they

had never met or communicated with Plaintiffs. Prior to the hearing on the motions, the trial court granted a continuance to allow additional jurisdictional discovery, but stayed any non-jurisdictional discovery pending resolution of the motions. Plaintiffs then deposed Defendants and the parties filed supplemental briefing on the personal jurisdiction issue.

The trial court granted the motions, concluding that Plaintiffs and Kobe failed to meet their burden of establishing facts supporting jurisdiction and that Defendants established through their declarations that their contacts with California did not support personal jurisdiction over them. The trial court also denied a request for additional jurisdictional discovery as to Wallman. Plaintiffs and Kobe timely appealed, but Kobe has since dismissed its appeal.

## DISCUSSION

### I. *General Legal Principles and Standard of Review*

The exercise of personal jurisdiction over a nonresident defendant may be either "general" or "specific." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445-446 (*Vons Companies*).) "General jurisdiction results where the defendant's contacts with the forum state are so 'systematic and so continuous as to make it consistent with traditional notions of fair play and substantial justice to subject the defendant to the jurisdiction of the forum, even where the cause of action is unrelated to the contacts.' [Citations.] Specific jurisdiction results when the defendant's contacts with the forum state, though not enough to subject the defendant to the general jurisdiction of the forum, are sufficient to subject the defendant to suit in the forum on a cause of action related to or

arising out of those contacts. [Citations.]" (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 536 (*Sonora Diamond*).)

The plaintiff has the burden to establish jurisdiction by a preponderance of the evidence. (*Roy v. Superior Court* (2005) 127 Cal.App.4th 337, 343.) Only if the plaintiff meets this burden must the defendant show that the exercise of jurisdiction would be unreasonable. (*Paneno v. Centres for Academic Programmes Abroad Ltd.* (2004) 118 Cal.App.4th 1447, 1454.) Where there is conflicting evidence, we review the trial court's factual determinations under the substantial evidence standard (*Vons Companies, supra*, 14 Cal.4th at p. 449) and resolve all conflicts "against the appellant and in support of the trial court's order." (*Wolfe v. City of Alexandria* (1990) 217 Cal.App.3d 541, 546.) When there is no conflict in the evidence, the question of jurisdiction is one of law, which we review de novo. (*Vons Companies, supra*, 14 Cal.4th at p. 449.) Where the trial court makes no factual findings in its order, we will nevertheless uphold the order based upon implied findings in its favor that are supported by substantial evidence. (See *Kulko v. Superior Court* (1977) 19 Cal.3d 514, 519, fn. 1, revd. on other grounds *Kulko v. California Superior Court* (1978) 436 U.S. 84.)

## II. *Specific Jurisdiction*

### A. Relevant Legal Principles

Specific jurisdiction exists if: (1) the defendant has purposefully availed itself of forum benefits with respect to the matter in controversy; (2) the controversy is related to or arises out of the defendant's contacts with the forum; and (3) the assertion of jurisdiction would comport with fair play and substantial justice. (*Vons Companies, supra*, 14 Cal.4th at

pp. 446-447.) The purposeful avilment inquiry is satisfied "'when the defendant purposefully and voluntarily directs his activities toward the forum so that he should expect, by virtue of the benefit he receives, to be subject to the court's jurisdiction based on' his contacts with the forum." (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269 (*Pavlovich*), quoting *U.S. v. Swiss American Bank, Ltd.* (1st Cir. 2001) 274 F.3d 610, 623-624.)

Jurisdiction over a nonresident corporation does not necessarily result in jurisdiction over the corporation's nonresident officers and directors. (*Calder v. Jones* (1984) 465 U.S. 783, 790; see *Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 904 [jurisdiction over a partnership does not necessarily permit a court to assume jurisdiction over the individual partners].) To establish a basis for personal jurisdiction, the officer or director must have personally directed or actively participated in the tortious conduct and that conduct must have been purposefully directed toward the forum state. (*Seagate Technology v. A.J. Kogyo Co.* (1990) 219 Cal.App.3d 696, 701-704.)

#### B. Gleeson

Plaintiffs contend Gleeson had sufficient contacts with California such that personal jurisdiction existed over him. We begin by reviewing the causes of action asserted and Plaintiffs' evidence presented in opposition to the motion, to determine whether the causes of action arose out of Gleeson's activities in California. (*Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703, 710.)

Plaintiffs alleged that Defendants intentionally or negligently failed to disclose the existence of the NexTrade agreement. They also allege that Defendants breached fiduciary

duties owed to them. The evidence they presented, however, does not show that these causes of action arose out of or were substantially related to Gleeson's activities in California.

Gleeson contacted the Pacific Stock Exchange in California on Economic Inventions's behalf in an effort to get the exchange to license Economic Inventions's patents. Gleeson sent a letter to the exchange, called it, met with a member of the exchange in California, assisted in the preparation of the licensing agreement and knew that Economic Inventions eventually reached a licensing agreement with the exchange. Although Plaintiffs claim this evidence shows that Gleeson purposefully directed his activities toward California, they fail to explain how these contacts can be personally ascribed to Gleeson, rather than arising exclusively from his role as an agent for Economic Inventions. (*Serafini v. Superior Court* (1998) 68 Cal.App.4th 70, 80.) More importantly, Plaintiffs have not shown that their causes of action arose out of or are substantially connected to these contacts.

Plaintiffs also contend that Gleeson participated in drafting Economic Inventions's business plan and that their claims arise out of the failure to disclose the existence of the NexTrade agreement in the business plan. While we agree that Plaintiffs' claims arise out of alleged omissions in the business plan, they have not presented evidence showing that Gleeson actually participated in drafting the business plan. Gleeson testified that certain portions of the business plan, namely the introduction and two sections addressing the major benefits of XPOs and customer profile were "lifted" from other materials he had previously drafted. Gleeson, however, did not know that Economic Inventions had generated business plans at different points of time, did not know about the business plan and never approved any of the business plans before Economic Inventions finalized them.

Finally, Plaintiffs contend that Gleeson's participation in preparing Economic Inventions's patents is sufficient to confer jurisdiction because the patents were aimed at impacting the entire United States, including California, thus establishing the purposeful availment element of specific jurisdiction. To support their argument, Plaintiffs cite *Goldberg v. Cameron* (N.D.Cal. 2007) 482 F.Supp.2d 1136 (*Goldberg*) and *Bragg v. Linden Research, Inc.* (E.D. Pa. 2007) 487 F.Supp.2d 593, 601 (*Bragg*).

In *Goldberg*, a copyright holder sued the producers of worldwide blockbuster movies for copyright infringement in California, where the plaintiff resided. (*Goldberg, supra*, 482 F.Supp.2d at pp. 1142, 1144-1145.) The court concluded that plaintiff had established specific jurisdiction over the producers because they knew the movies would have a worldwide audience, including California, the copyright infringement impacted California and plaintiff's claim arose out of the copyright infringement. (*Id.* at pp. 1145-1146.)

*Bragg* involved a dispute over virtual property in a multi-player role-playing online game. Bragg sued the operator of the website and defendant, its chief executive officer, claiming that defendant's fraudulent representations induced him to purchase the virtual property. (*Bragg, supra*, 487 F.Supp.2d at pp. 595-597.) The court found that defendant's fraudulent representations were part of an interactive national marketing scheme to induce persons to purchase virtual property and that this action constituted sufficient contacts to exercise specific personal jurisdiction over him. (*Id.* at pp. 598-601.)

Thus, the courts in *Goldberg* and *Bragg* found purposeful availment in the forum state because the alleged tortious conduct giving rise to the respective claims (i.e., the copyright infringement and fraudulent representations) was directed at a wide audience, including the



forum state. In contrast here, the patents or Gleeson's participation in preparing the patents did not constitute tortious conduct giving rise to Plaintiffs' claims. (*Vons Companies, supra*, 14 Cal.4th at p. 452 [crucial inquiry is the character of defendant's activity in the forum and whether the cause of action arises out of or has a substantial connection with that activity].) The fact Plaintiffs would never have invested in Economic Inventions but for the existence of the patents does not change this.

In summary, the trial court correctly determined that the evidence was insufficient to establish specific jurisdiction over Gleeson in California because Plaintiffs' claims did not arise out of or have a substantial connection with his contacts in the state.

C. Wallman

Plaintiffs argue that Wallman purposefully availed himself of the benefits of doing business in California by allowing his name to be used in Economic Inventions's business plan to "endorse" the company and because he knew that Plaintiffs had received the business plan in California. They claim that Wallman's actions in endorsing Economic Inventions caused their harm because they would not have invested in Economic Inventions but for the representations in the business plan that he was involved with the company. They also note that Wallman allowed the use of his name in a magazine article printed in *Inc. Magazine* supporting Economic Inventions.

It is undisputed that Wallman's name and information regarding his background were included in the business plan under "key personnel" and that Plaintiffs received this information from Wasserman. Plaintiffs, however, presented no evidence that Wallman participated in the preparation or distribution of the business plan or approved the use of his

name. Even assuming Wallman allowed Economic Inventions to use his name in its business plan and that Plaintiffs relied on this information to their detriment, this is insufficient to establish jurisdiction absent any evidence that Wallman expressly targeted California. (*Pavlovich, supra*, 29 Cal.4th at pp. 270-273.)

Plaintiffs' reliance on *Hanberry v. Hearst Corp.* (1969) 276 Cal.App.2d 680 (*Hanberry*) to support their argument that Wallman's "endorsement" of Economic Inventions is sufficient to confer jurisdiction is misplaced. *Hanberry* addressed whether the purchaser of defectively manufactured and designed shoes stated a cause of action for damages against the publisher of *Good Housekeeping* magazine, where the purchaser relied on the "Good Housekeeping Consumer's Guaranty Seal" in an advertisement in the magazine and placed on the shoes and in the shoe box. (*Id.* at pp. 682-683.) *Hanberry* does not address jurisdiction.

Plaintiffs have also failed to show how the *Inc. Magazine* article constituted purposeful availment of the benefits of doing business in California with respect to the matter in controversy. The author of the magazine article obtained information about Economic Inventions from Wasserman and prepared two articles about the company. In October 2003, the author left a telephone message for Wallman and sent him an e-mail message because the "fact checker" for the article could not reach Wallman to confirm some information. In response, Wallman corrected erroneous information regarding his position at Economic Inventions and provided a quote for the article that the magazine published in December 2003. This passive contact with California does not show that Wallman purposefully availed himself of the benefits of doing business in California. Plaintiffs have

also failed to show how this activity is related to their claims. Plaintiffs could not have relied on any information in the article because they invested in Economic Inventions in May 2003, before the magazine published the article.

Plaintiffs also contend that specific jurisdiction exists because Wallman assisted in the negotiations for the NexTrade agreement by discussing regulatory matters with NexTrade employees, reviewing the agreement and discussing it with Daugherty and Gleeson. Plaintiffs claim that because the NexTrade agreement created a worldwide license of Economic Inventions's patents, it was reasonably foreseeable that Wallman knew his actions would impact California and cause harm there. We reject this assertion because Plaintiffs' complaint arises out of alleged misrepresentations regarding the existence of the NexTrade agreement, not any contact Wallman had with NexTrade or any advice he may have provided to Daugherty or Gleeson regarding the agreement. (*Pavlovich, supra*, 29 Cal.4th at p. 269.) Simply put, Plaintiffs have not presented any evidence showing Wallman engaged in intentional conduct expressly aimed at California and sufficiently related to their claims to warrant subjecting him to jurisdiction in California.

### III. *General Jurisdiction*

Plaintiffs contend that even assuming we conclude there is insufficient evidence to support a finding of specific jurisdiction, that the order can be reversed based on principles of general jurisdiction, which permit a court to exercise personal jurisdiction over a nonresident defendant if the defendant's contacts with the forum state are "substantial . . . continuous and systematic." (*Vons Companies, supra*, 14 Cal.4th at p. 445, quoting *Perkins v. Benquet Mining Co.* (1952) 342 U.S. 437, 445-446.) Specifically, for the first time on appeal,

Plaintiffs argue that Economic Inventions is the alter ego of Defendants and that we can address this issue on appeal because the facts are undisputed and the question is one of law. Defendants assert that Plaintiffs waived the issue by failing to raise it below, the question of alter ego is one of fact and it would be unfair to decide the issue on appeal because they were not given the opportunity to present all their evidence on this issue below.

As a general matter, a theory not raised in the trial court is waived on appeal. (See, e.g., *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094, fn. 3.) While it is true that a new theory pertaining to a question of law involving undisputed facts appearing in the record may be raised for the first time on appeal, a reviewing court is not required to apply this exception and it is within our discretion to determine whether to consider a new theory raising a pure question of law. (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316-1317.) Additionally, "if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial, the opposing party should not be required to defend against it on appeal." (*Adelson v. Hertz Rent-A-Car* (1982) 133 Cal.App.3d 221, 225.)

Here, even assuming the facts presented below are undisputed, their meaning is hotly contested. More importantly, an alter ego determination requires the review of numerous factors and courts must look at all the circumstances to determine whether the doctrine should be applied. (*Sonora Diamond, supra*, 83 Cal.App.4th at pp. 538-539.) Because Plaintiffs did not raise this issue below, Defendants were not on notice that they needed to present any evidence on the factual criteria related to an alter ego determination. (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879.) Nor did they receive an

opportunity to object to Plaintiffs' evidence. Accordingly, it is unfair to address this issue for the first time on appeal and to the extent we have discretion to review this issue, we decline to do so.

#### IV. *Requested Continuance*

Plaintiffs assert the trial court erred in denying their second request for a continuance to conduct jurisdictional discovery because Defendants refused to answer numerous questions and objected to the scope of discovery. We disagree.

As a preliminary matter, Plaintiffs waived this issue as to Gleeson because their supplemental opposition requested a continuance to allow more discovery only as to Wallman. Specifically, Plaintiffs argued that after conducting Wallman's deposition, he objected to their follow-up special interrogatories and requests for production seeking information about an out-of-state company, for which Wallman was an officer, asking what contacts that company had with California. We cannot say the trial court abused its discretion by concluding that further discovery was unnecessary because, even assuming this company had extensive contacts with California, these contacts cannot be imputed to Wallman (*Calder v. Jones*, *supra*, 465 U.S. at p. 790) and the discovery did not seek any information relevant to showing whether Wallman was an alter ego of that company.

Plaintiffs also sought to discover evidence regarding Wallman's involvement in the written materials they received from Economic Inventions and his participation in Economic Inventions's omissions to them. Plaintiffs', however, had already deposed Wallman and they could have sought this information then. Under these circumstances, the trial court did not abuse its discretion in denying the requested continuance.

## DISPOSITION

The order is affirmed. Defendants are to recover their costs on appeal.

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McINTYRE, J.

WE CONCUR:

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HALLER, Acting P.J.

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AARON, J.